

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
UNITED ACADEMICS, AAUP/AFT)	DOCKET NO. 09-35
(RE: CLINICAL ASSISTANT)	
PROFESSORS OF NURSING))	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The United Academics, AAUP/AFT (“Union”) filed a grievance on October 20, 2009. Therein, the Union alleged that the University of Vermont (“Employer”) violated Article 5.1 of the collective bargaining agreement between the Union and the Employer effective December 22, 2005 to June 30, 2008 (“Contract”) by paying a newly hired Clinical Assistant Professor of Nursing, Jerry Linseisen, a salary which, when compared with female clinical nursing faculty members Carol Buck-Rolland, Maureen Curley, Christina Melvin, Catherine Muskus and Rebecca Montgomery, constituted discrimination based on gender.

The Labor Relations Board conducted hearings in the Board hearing room in Montpelier on March 11, May 17, May 18 and May 19, 2010, before Board Members Edward Zuccaro, Chairperson; Leonard Berliner and Gary Karnedy. Attorney Thomas Somers represented the Union. Attorney Karen McAndrew represented the Employer. The parties filed post-hearing briefs on July 9, 2010.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

...

**ARTICLE 5
ANTI-DISCRIMINATION**

1. The University and the Union, to the extent of their respective authority and responsibility, agree not to discriminate against a faculty member with respect to the application of the provisions of this Agreement because of . . . sex . . .

...

ARTICLE 12 GRIEVANCE AND ARBITRATION PROCEDURE

...

6. If the grievance involves allegations that the University has discriminated on the basis of . . . sex . . . it will be processed in the same manner as any other grievance, except that either the University or the Union may forward such a grievance to the University Office of Affirmative Action (AAEO) after it has been initially filed.

In such a case, the processing of the grievance by the initial recipient will be suspended pending completion by the AAEO of the factual issues surrounding the grievance. The investigation by AAEO will be limited to findings of fact, and, absent extenuating circumstances, will be completed within thirty (30) days of AAEO's receipt of the grievance.

Upon completion of the investigation, AAEO will send a report to the initial recipient of the grievance, the grievant, the University and the Union. Upon receipt of the AAEO report, the initial recipient will schedule the appropriate grievance meeting as provided herein.

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ARTICLE 18 SALARY

SUMMARY OF SALARY INCREASES

	<u>FY 06</u>	<u>FY 07</u>	<u>FY 08</u>
Across-the-board	3.5%	3%	2.5%
Market/Compression	1%	2%	2%
Performance	0	1%	1.25%

...

FY 08 Increases

a. Across the board. For FY 08, effective July 1, 2007, and except as otherwise provided, each faculty member employed by the University on February 1, 2007 and still employed in the bargaining unit on the date of ratification, shall receive an across the board salary increase of 2.5% added to his or her FY 07 base salary.

b. Performance Increases

i. For FY 08, effective July 1, 2007, an amount equal to 1.25% of the total salary dollars payable as of February 15, 2007 to bargaining unit members supported by the General Fund and to those unit members in Extension . . . will be distributed as performance-based awards to selected faculty members who are supported by the General Fund and to those unit members in Extension. The

1.25% will be allocated to each school or college proportionate to its share of the 2/15/07 bargaining unit salary line. The dean of each school or college, after consideration of the recommendations of the department chair, shall decide whether or not a unit member shall receive a performance-based award and, if so, how much.

ii. Performance-based increases will be made effective July 1, 2007 and only for those who were employed on February 1, 2007 and still employed in the bargaining unit on July 1, 2007.

...

c. Market Adjustments

i. For FY 08, the parties agree that an amount of money equal to 2% of the total salary dollars payable as of February 15, 2007 to bargaining unit members supported by the General Fund and to those unit members in Extension, excluding those unit members who are not returning to the University for the next academic year, will be set aside to be distributed for market adjustments to tenured and tenure-track faculty, librarians, clinical faculty, lecturers and to those unit members in Extension.

The market money provided herein may also be used for compression purposes.

ii. For the distribution of market money, and for this agreement only, the parties will utilize the approach to market adjustments utilized by the Union pursuant to the Agreement in effect between the parties over the period February 6, 2003 – June 30, 2005. . . Representatives of the Union and the University will meet to discuss and review the distribution of market money as soon as practicable after the ratification of this Agreement.

iii. No faculty member shall receive more than a \$2,200 market adjustment.

...

9. With the exception of providing the minimum salaries herein, the University retains the right to set the initial salary of any faculty member appointed to the bargaining unit . . .

2. The market/compression salary adjustments provided for in the Contract have been distributed by the Union since 2003. Market adjustments are determined according to an annual survey conducted by Oklahoma State University on faculty salaries at universities throughout the United States. Market adjustments are made according to how University of Vermont (“UVM”) faculty compare to national averages

for their rank and discipline. The Union bases its salary comparisons on tenure track faculty salaries. Clinical faculty members at UVM receive any market salary adjustments based on tenure track faculty salaries, not clinical faculty salaries (Union Exhibit 32).

3. Compression is a salary phenomenon which is characterized by a narrowing of differences to a significant degree between the salaries of continuing faculty members and the salaries of those faculty members who are newly hired in a particular year, adjusting for similarities and differences in responsibilities. Compression adjustments are made by the Union to longer serving faculty members to widen the difference between their salaries and newly hired faculty members in situations where the gap has been considerably narrowed. Most of the salary increases provided by the Union pursuant to the Contract provision on market/compression salary adjustments are market adjustments rather than compression changes. The Union has provided adjustments based on compression in only two or three years since 2003 and the compression increases have constituted only a small percentage of the total market/compression adjustments (Union Exhibit 32).

4. The Department of Nursing at UVM offers undergraduate courses towards a Bachelor of Science in Nursing degree, and graduate courses towards a Masters of Science in Nursing degree. The Department has a mix of full-time and part-time faculty. It also has a mix of tenure track and clinical faculty. Clinical faculty members need a certain amount of hours of clinical practice to maintain their certification. The UVM Department of Nursing generally allows clinical faculty to work one day a week in clinical practice as part of the faculty member's workload.

5. UVM, like other colleges and universities, has experienced increasing difficulties in hiring nursing faculty since the early 2000's. Generally, there are small applicant pools for faculty openings. This results from salaries in clinical practice being significantly higher than in academia. Salaries for nurses in private practice have risen quickly and sharply since the early 2000's.

6. Christina Melvin has been a full-time faculty member at UVM since 1992. She was Lecturer from 1992 to 1995, Clinical Assistant Professor from 1996 – 2000, and Lecturer in 2001. She has been Clinical Assistant Professor from 2002 to the present. Melvin received a Bachelor of Science in Professional Nursing degree from UVM in 1974, and a Master of Science in Community Health Nursing degree in 1979 from Boston College. She has been certified by the American Nurses Association as a Community Health Clinical Specialist since 1997. Melvin is not a Nurse Practitioner. There is not a Nurse Practitioner level for the community health specialty. Melvin has worked part-time the past five years as a registered nurse for the Vermont Respite House, a home for the terminally ill. Her work at the Respite House is considered part of her UVM workload, although her wages for this position are not paid by UVM. She is paid as a Registered Nurse at the Respite House, not as an advanced practice nurse. Melvin is not able to prescribe medication. Melvin has never worked in a physician's office (Joint Exhibit 2, Appendix 5).

7. Melvin has taught courses at UVM on community health and end-of-life care. She teaches courses at the undergraduate level, and does not teach graduate courses. She is not academically prepared to teach primary care to students in the family nurse practitioner track. Nursing students need to take courses in community health at the

Bachelor degree level to pass the Registered Nurse exam. Melvin is an adviser to undergraduate students. She has been extensively involved in placing students in clinical positions in the community (Joint Exhibit 2, Appendix 5).

8. When Melvin was appointed as a Clinical Assistant Professor for the 2002-2003 academic year, she was paid a salary of \$41,600. By the 2007-2008 academic year, her salary had increased to \$54,459. Her salary during the 2008-2009 academic year was \$57,191. She received a total of \$4,513 in market salary adjustments from the 2002-2003 academic year through the end of the 2008-2009 academic year (Joint Exhibit 2, Appendices 3 and 5; Employer Exhibit 4).

9. Carol Buck-Rolland has been a full-time faculty member in the UVM Department of Nursing since 1996. She was a Lecturer from 1996 to 2001, a Clinical Assistant Professor from 2001 to 2009, and Clinical Associate Professor for the last academic year. She received a Bachelor of Science in Nursing degree from the University of Southern Maine in 1976, and a Master of Science degree in Maternal Child Health/Nursing Education from Virginia Commonwealth University in 1980. She has completed all the requirements for a doctorate in Educational Leadership and Policy Studies from UVM except for a dissertation. Buck-Rolland has been nationally certified since 1980 as a Pediatric Nurse Practitioner, and nationally certified since 1986 as a Women's Health Nurse Practitioner. She has worked part-time as a Pediatric Nurse Practitioner for the Child Development Clinic of the State Health Department since 1994. She also has worked part-time since 1985 as a Women's Health Nurse Practitioner with Planned Parenthood of Northern New England. Buck-Rolland is an Advanced Practice Nurse and Nurse Practitioner (Joint Exhibit 2, Appendix 4).

10. Buck-Rolland teaches graduate-level courses in both women's health and pediatrics. She does not teach undergraduate courses. She places graduate students in preceptorships where they get experience in clinical settings, and evaluates their performance in preceptorships. She is an adviser to graduate students. She serves on faculty committees, and helps design curricula and coursework.

11. When Buck-Rolland was appointed as a Clinical Assistant Professor for the 2001-2002 academic year, she was paid a salary of \$42,761. By the 2007-2008 academic year, her salary had increased to \$55,571. Her salary during the 2008-2009 academic year was \$58,359. She received a total of \$2,812 in market salary adjustments from the 2002-2003 academic year through the end of the 2008-2009 academic year (Joint Exhibit 2, Appendices 3 and 4; Employer Exhibit 4).

12. Greg Newschwander was Chair of the UVM Department of Nursing from 2004 to 2008.

13. During his tenure as Chair, the Department of Nursing developed a Master's entry program in Nursing, specially designed for students who already had college degrees in a field other than nursing. The program came to be referred to as the "MEPN" program. Students in the MEPN program take courses on an accelerated basis in the upper-level undergraduate nursing curriculum, completing in 14 months the course work that undergraduate nursing students take two years to complete. This is called the MEPN program's "pre-licensure year". The MEPN students then take the Registered Nurse exam. Subsequently, they enter the graduate nursing program directly for training in an advanced practice nursing specialty. The first class of MEPN students began in the 2006-2007 academic year.

14. The institution of the MEPN program meant that the graduate nursing program at UVM included both traditional graduate students (i.e., those with undergraduate nursing degrees) and MEPN students. Students can choose from several specialty areas: Family Nurse Practitioner, Psychiatric Clinical Nurse Specialist, Adult Nurse Practitioner and Clinical Systems Management. The number of students choosing the Family Nurse Practitioner specialty has been far greater than the other specialties at all times relevant. This has resulted from UVM focusing its nursing program on preparing students primarily for rural practice in Vermont, a context in which nurse practitioners see patients across their entire life span. The Family Nurse Practitioner track lends itself best to this focus.

15. During his tenure as Chair of the UVM Department of Nursing, Newschwander made salary offers to applicants for faculty positions in the Department. In late May of 2006, Newschwander verbally offered Rebecca Montgomery a position of Clinical Assistant Professor in the Department of Nursing at the salary of \$46,000 for the 2006-2007 academic year. At the time he made the salary offer, the position had not been open for long and there was not pressure to fill it. The position required someone with maternity experience, and there were available faculty with this background. Montgomery asked Newschwander if the salary was negotiable. Newschwander indicated that the salary offer was firm and stated that he was working with a tight budget. Montgomery understood the salary offer was close to the salary of the faculty member who was leaving the position. Montgomery agreed to accept the position at the \$46,000 salary (Joint Exhibit 2, Appendix 6).

16. At the time she was hired, Montgomery possessed a Vermont Board of Nursing Advanced Practice Nurse certification of Certified Nurse Midwife. She had served from 2000 to 2003 as a Nurse Midwife at Gifford Medical Center. She also had practiced as a Nurse Midwife one day a week at Planned Parenthood of Northern New England since 2004. Montgomery has continued serving in that position one day a week to the present. Montgomery received a Bachelor of Arts degree in Sociology from UVM in 1993. She received a Master's of Science in Nursing: Nurse-Midwifery Concentration from Yale University in 1999. At the time she was hired, she had one semester of teaching experience (Joint Exhibit 2, Appendix 6).

17. Montgomery has remained employed at UVM as a full-time Clinical Assistant Professor in the Department of Nursing since 2006. Montgomery has taught courses in maternal newborn nursing and women's health. Montgomery is responsible for teaching students the maternal newborn nursing content that they need for taking the Registered Nurse exam. She has taught undergraduate courses, and also has taught MEPN students during their pre-licensure year in the first fourteen months of the program. UVM does not have a Nurse Midwife training program. Montgomery does not handle the placement of graduate students, but has served as adviser to many students. She has maintained her Advanced Practice Nurse certification of Certified Nurse Midwife. Montgomery is able to prescribe medication to women but she cannot do so for men or otherwise treat men (Joint Exhibit 2, Appendix 6).

18. Montgomery's salary increased to \$48,479 for the 2007-2008 academic year. Her salary during the 2008-2009 academic year was \$50,911. She received a total

of \$1,247 in market salary adjustments for the 2007-2008 and 2008-2009 academic years (Joint Exhibit 2, Appendices 3 and 6; Employer Exhibit 4).

19. Catherine Muskus received a Bachelor of Science degree in Nursing from UVM in 1995 and a Master of Science in Nursing degree from UVM in 2002. She was employed as an Lecturer in the Department of Nursing from 2003 to 2007. In that position, Muskus taught undergraduate courses in the Department of Nursing and she also served as nursing skills lab director. She taught maternity courses and physical assessment courses. These courses are required for students to take the Registered Nurse exam. Muskus has arranged a limited number of clinical placements for undergraduate students. Muskus has not taught graduate students or placed them in clinical settings during her tenure at UVM. Muskus is licensed to issue prescriptions.

20. In the Spring of 2007, Muskus informed Newschwander that it was time for her to recertify as a Family Nurse Practitioner and that she needed a position which allowed her one day a week to engage in clinical practice to be certified. At that time, she had never had clinical experience as a Family Nurse Practitioner. Newschwander appointed Muskus to a position as Clinical Assistant Professor for the 2007-2008 academic year. Her duties stayed the same except that the time spent on lab director duties decreased to 41 percent of her workload to allow her to engage in one day of clinical practice (Joint Exhibit 2, Appendix 7).

21. When Muskus's position changed from Lecturer to Clinical Assistant Professor, there was no change in the annual salary which she was paid of \$49,242. There was no negotiation on salary between Newschwander and Muskus. Muskus obtained a one day a week clinical practice position in early 2008 with Synergy Counseling as a

Family Nurse Practitioner working with patients who are opiate-dependent. Muskus is independently paid in this position from her UVM salary. This has allowed her to significantly increase her wages beyond her UVM salary. (Joint Exhibit 2, Appendix 7).

22. Muskus's salary increased from \$49,242 to \$51,713 for the 2008-2009 academic year. This included a market salary adjustment of \$501 (Joint Exhibit 2, Appendices 3 and 7; Employer Exhibit 4).

23. Maureen Curley has been a full-time Clinical Assistant Professor in the UVM Department of Nursing since the 2007-2008 academic year. She received a Bachelor of Science degree in Nursing from the University of Massachusetts in 1976, and a Master of Science degree in Psychiatric Nursing from Boston College in 1993. She has been enrolled since 2005 as a Ph.D candidate in Nursing at McGill University. Prior to being hired as a Clinical Assistant Professor at UVM, she had several years experience as a part-time assistant professor and instructor at the University of Massachusetts and the University of North Florida. She was an Advanced Practice Registered Psychiatric Nurse at North Country Hospital in Newport, Vermont, from 1997 to 2005. Previously, she was a Psychiatric Clinical Specialist for approximately six years in Massachusetts (Joint Exhibit 2, Appendix 8).

24. Curley negotiated with Newschwander in the summer of 2007 concerning her salary, release time due to her doctoral studies at McGill, and part-time clinical practice. Newschwander moved his initial salary offer up a few thousand dollars in negotiations with Curley, and they agreed she would be paid \$49,000 for the 2007-2008 academic year. Newschwander told Curley there was a benchmark for salary, specifically that he could not pay her more than Department of Nursing faculty member Marsha Ring.

Newschwander and Curley agreed that Curley would be granted 15% paid release time for doctoral research. Newschwander had granted no other clinical assistant professor release time for doctoral work. Newschwander and Curley also agreed that 10% of Curley's effort under her workload plan at UVM would be devoted to private psychotherapy practice as an advanced practice psychiatric nurse (Joint Exhibit 2, Appendix 8).

25. Curley teaches mental health courses for undergraduate and graduate students. She acts as an adviser to students. UVM offers a graduate degree in psychiatric nursing. There are far fewer psychiatric nursing students than family nurse practitioner students in the graduate program. Curley places graduate students in clinical placements. Curley is certified as an Advanced Practice Psychiatric Nurse. Curley performs clinical work one day a week at Matrix Services, an outpatient mental health service in Burlington. She is paid by Matrix independently from her UVM salary. Curley has not practiced in the intensive care unit or the emergency room, except with respect to psychiatric patients. Curley is not qualified to teach primary care or acute care courses. Curley can prescribe psychiatric medication; she is unable to prescribe other medication (Joint Exhibit 2, Appendix 8).

26. Curley's salary increased from \$49,000 to \$51,458 for the 2008-2009 academic year. This included a market salary adjustment of \$498 (Joint Exhibit 2, Appendices 3 and 8, Employer Exhibit 4).

27. In 2007, Newschwander hired Linda Greenfield as a tenure track Associate Professor in the Department of Nursing. Newschwander agreed to pay Greenfield a salary approximately \$1,300 higher than Jeanine Carr, a tenured Associate

Professor in the Department who had been a faculty member at UVM since 1994, because Greenfield's area of expertise was attractive to UVM (Union Exhibits 41i).

28. UVM's nursing programs are accredited through the Commission on Collegiate Nursing Education ("CCNE") and subject to regulation by the Vermont Board of Nursing. A full accreditation review of the UVM program was scheduled to take place in the spring of 2010. The CCNE standards for accreditation provide that nursing programs have faculty "sufficient in number to accomplish the mission, goals, and expected student and faculty outcomes for the programs," and that they have faculty "academically prepared for the areas in which they teach and experientially prepared for the areas in which they teach." Further, "(f)aculty teaching in advanced practice clinical courses (must) meet certification and practice requirements as specified by the relevant regulatory and specialty bodies." (Employer Exhibit 11).

29. Under Vermont Board of Nursing Administrative Rules, "(a)ll nursing education programs shall have academically and experientially qualified nurse faculty in sufficient numbers and expertise to achieve the objectives of the nursing education program." Under the Administrative Rules, "(a)pproval of Advance Practice Registered Nurse Education programs is based on the ability of the program to meet . . . criteria," including a requirement that "faculty shall include master's prepared advanced practice registered nurses currently certified and endorsed in the State of Vermont and in the category specialty being taught." Further, "curriculum shall include . . . content . . . in supervised clinical practice relevant to the category/specialty of advanced practice registered nurse." (Employer Exhibit 9).

30. The National Task Force on Quality Nurse Practitioner Education issued a report in 2008 on criteria for evaluation of nurse practitioner programs. It provides in part:

The director/coordinator of the NP program must be nationally certified in a particular NP population focus area of practice. In programs with multiple tracks, the director/coordinator of the NP program may be certified in only one NP population-focused area of practice but have responsibility or leadership of all the NP tracks. Thus, in larger multi-track programs, lead faculty in a population-focused track should have the NP certification in that area while the overall program director may be certified in another NP population-focused area of practice.

(Employer Exhibit 10)

31. Despite the popularity of the Family Nurse Practitioner track of the graduate program and the addition of the MEPN program, the Department of Nursing did not have a Family Nurse Practitioner on its full-time faculty for at least the four years preceding 2008. There were several Family Nurse Practitioners on the part-time faculty but Newschwander concluded that a full-time faculty member who was a Family Nurse Practitioner was needed in the graduate nursing program. This was because the work that full-time and part-time faculty do are significantly different, especially with regard to the design of programs, development of curriculum, the assessment and evaluation of programs and the committee work that is done on programs. This work is done by full-time faculty and is not performed by part-time faculty. Part-time faculty do not serve on committees, they do not serve as advisors to students, and they do not engage in clinical placements of students.

32. Advising students and placement of students are significant parts of the responsibilities of full-time faculty members in graduate programs. In the absence of a full-time faculty member who was a Family Nurse Practitioner, Buck-Rolland and Nancy

Morris, a tenured full-time faculty member in the Department of Nursing, assumed the bulk of the responsibilities for the advising and clinical placement of students in the UVM graduate nursing program. Buck-Rolland Morris are not certified Family Nurse Practitioners.

33. During several years prior to 2007, the Department of Nursing sought to hire a tenure track track faculty member for the full-time Family Nurse Practitioner position. Applicants for the position were required to have a doctorate. The Department had no success with these searches. The Department then changed the position to a clinical assistant professor with no doctorate being required. The need to fill the position was increasing as the institution of the MEPN program meant that the enrollment in the graduate level family nurse practitioner program was significantly increasing. The Department sought a family nurse practitioner with experience treating patients across the lifespan.

34. The Department of Nursing advertised an opening in 2007 for a Clinical Assistant Professor with an expertise as a Nurse Practitioner (Family Nurse Practitioner or Acute Care Nurse Practitioner). The announcement stated that “(r)esponsibilities include classroom and clinical teaching in the undergraduate and graduate program, student advisement, involvement in scholarly activities related to ongoing clinical practice, and service to the Department, University, and the community-at-large.” It further provided: “Qualifications include a master’s degree in nursing with appropriate clinical specialization and eligibility for RN licensure in Vermont. Teaching experience and evidence of scholarship preferred” (Union Exhibit 17).

35. Newschwander appointed a search committee. Buck-Rolland was included on the committee. The committee identified qualified candidates and made recommendations to Newschwander. In November 2007, Newschwander offered the position of Clinical Assistant Professor to Emily Byrne. Byrne received a Bachelor of Science degree, and a Master of Science degree, in Nursing from Thomas Jefferson University. Byrne was a certified Family Nurse Practitioner. She had been working as a part-time Family Nurse Practitioner with the Central Vermont Medical Group Practices since July 2007 providing primary care for acute and chronically ill patients across the lifespan, and as a Registered Nurse at Central Vermont Hospital since October 2006. She also had been a Professor of Nursing at Norwich University since July 2005. She was an Advanced Practice Registered Nurse with the University of Vermont from February 2007 to September 2007. Prior to moving to Vermont, she was an Advanced Practice Registered Nurse in Connecticut from April 2003 to July 2005 and a staff nurse in several states from 2000 to 2003 (Union Exhibit 36).

36. Newschwander made a salary offer to Byrne, she counter-offered, and Byrne ultimately indicated an intent to take the position at a salary of \$52,000 per year beginning in the Spring 2008 semester. On November 6, 2007, Newschwander sent Byrne a letter offering her the position at the annual salary of \$52,000. However, in mid-December 2007, Byrne informed the Department of Nursing that she was not going to accept the position (Union Exhibit 35).

37. Newschwander then reopened the search and appointed another search committee. Faculty members Buck-Rolland, Carr and Morris conducted interviews in April 2008 for the Clinical Assistant Professor position with the following candidates:

Tara Abele, Kathleen Bryant, Ginny Crockett-Maillet, Marty Linseisen, Colleen Mitchell and Geri Wolberg. Crockett-Maillet lacked the experience sought by the Department of Nursing. Abele and Wolberg withdrew their applications. Bryant indicated at the end of her interview that she needed more primary care experience before working in a faculty position. Ultimately, the search committee recommended Linseisen as the only qualified candidate for the position (Union Exhibits 20 – 26).

38. Linseisen received a Bachelor of Science degree in Nursing from the University of New Mexico in 1995, and a Master of Science in Nursing, with a Family Nurse Practitioner specialty, from the University of Utah in 2001. During the period between receiving his undergraduate degree and obtaining his graduate degree, Linseisen practiced as a Registered Nurse providing patient care in a cardiac intensive care/cardiovascular recovery unit, as a flight Registered Nurse responsible for patient care during transport of critically ill patients, and as an Intensive Care Nurse providing patient care in medical/surgical/trauma/intensive care units (Joint Exhibit 2, Appendix 9).

39. After receiving his Master's degree in 2001, Linseisen moved to Vermont. He then was employed as a practicing Nurse Family Practitioner from October 2001 through the time he applied for the full-time Clinical Assistant Professor position at UVM. He was a primary care provider in rural settings for children and adult with acute and chronic illnesses at Northwestern Medical Center Rural Health Clinics from October 2001 through June 2002, and at Richford Health Center from June 2002 to August 2002. He provided Family Nurse Practitioner services at the UVM Center for Health and Wellbeing from September 2005 to November 2006, providing comprehensive primary care to university students with acute and chronic problems. He worked at the

Northwestern Medical Center as a Family Nurse Practitioner in Saint Albans from August 2002 through the time he applied for the faculty position at UVM, providing broad scope emergency care to children and adults in a busy, fast-paced emergency department. Linseisen is qualified to prescribe medication. Based on his education and experience, Linseisen is qualified to provide services for patients as a Family Nurse Practitioner across the entire life span, from birth to death (Joint Exhibit 2, Appendix 9).

40. Linseisen was a Clinical Preceptor for the UVM Department of Nursing from September 2005 through the time he applied for the faculty position. A preceptor is a clinical faculty member who oversees the work of a number of students. As a preceptor for nurse practitioner students in their final semester of study at UVM, Linseisen facilitated students' acquisition of urgent/acute care skills. Linseisen received excellent evaluations from UVM students. When he was in graduate school at the University of Utah, he was a graduate teaching assistant from August 1999 to May 2001. He assisted nursing faculty in teaching undergraduate courses. His duties included lecturing, preparing lectures and creating assignments (Joint Exhibit 2, Appendix 9).

41. On the recommendation of the search committee, and following an interview, Newschwander decided to offer the Clinical Assistant Professor position to Linseisen for the 2008-2009 academic year. In considering what salary he would offer Linseisen, he looked at the two full-time faculty members then primarily teaching in the nurse practitioner program, Carol Buck-Rolland and tenured professor Nancy Morris. Newschwander viewed Linseisen as most comparable to Buck-Rolland given they both would be in clinical faculty positions requiring them to be experienced and certified nurse practitioners. Buck-Rolland was scheduled to receive a salary of \$58,359 for the 2008-

2009 academic year. Newschwander did not compare the salaries of Muskus, Curley, Melvin or Montgomery to any salary offer to Linseisen because he did not view their positions as similar to the position he was offering Linseisen. Newschwander first offered Linseisen a salary in the range of \$55,000 (Union Exhibits 37, 41j).

42. Upon receipt of this salary offer, Linseisen contacted Newschwander to inquire if the salary was negotiable. When Newschwander indicated that it was, Linseisen did some calculations to determine the salary which he would need from UVM so that he could match his income from his current position at Northwestern Medical Center. He was earning approximately \$85,000 a year in that position, working a 36 hour week comprised of three 12-hour shifts. After taking account of the fact that the UVM position was a nine-month appointment, Linseisen calculated what he would be able to earn in clinical practice in addition to his faculty salary. He then countered Newschwander's salary offer with a request for \$62,000.

43. Newschwander had concerns that if he did not hire Linseisen and relieve the workload of Buck-Rolland and Morris, who had carried a heavy share of the workload for the MEPN program, he could lose one of them. Neither Buck-Rolland nor Morris had informed Newschwander that they were considering resigning from their positions. Newschwander also was concerned that, if he paid Linseisen more than Buck-Rolland, he could lose Buck-Rolland. Negotiations continued on Linseisen's salary in this context. Linseisen indicated that \$58,000 was the "bottom line" salary he would accept. Newschwander and Linseisen ultimately agreed that Linseisen would be paid this salary for the 2008-2009 academic year. Linseisen continued to work at the Northwestern

Medical Center on a part-time basis after assuming his full-time faculty responsibilities at UVM (Joint Exhibit 2, Appendix 9).

44. The salaries paid to the five female clinical assistant professors in the Department of Nursing increased by an average of \$2,576 between the 2007-2008 and 2008-2009 academic years. Their specific salaries were:

	<u>2007-2008</u>	<u>2008-2009</u>
Rebecca Montgomery	\$48,479	\$50,911
Maureen Curley	\$49,000	\$51,458
Catherine Muskus	\$49,243	\$51,713
Christina Melvin	\$54,459	\$57,191
Carol Buck-Rolland	\$55,571	\$58,359

(Joint Exhibit 2, Appendix 3)

45. During the 2008-2009 academic year, Linseisen taught courses at the undergraduate and graduate levels in connection with the Family Nurse Practitioner program. Upon being hired, Linseisen assumed the duty of clinical placement of many graduate nurse practitioner students in family practice and adult health settings. Buck-Rolland continued to do the clinical placement of graduate nurse practitioner students for women's health and pediatrics. This was a time-consuming responsibility for Linseisen and Buck-Rolland given that the MEPN program had significantly expanded the number of students requiring clinical placements. Linseisen was required to place more students than Buck-Rolland. Prior to Linseisen being hired, Buck-Rolland had to place most of the nurse practitioner students. Maureen Curley also was required to place psychiatric students in clinical placements. The number of psychiatric students was relatively small compared to the number of nurse practitioner students, resulting in Curley having to place many fewer students than Linseisen.

46. In addition to many clinical placements, Linseisen was adviser to a large number of nurse practitioner students. These responsibilities combined with his other duties as a faculty member resulted in Linseisen having a heavy workload. Linseisen's workload plan at UVM provides that his clinical practice at the Northwestern Medical Center constitutes 20 percent of his workload responsibilities (Joint Exhibit 2, Appendix 9).

47. The Union filed a grievance alleging that the salary paid to Linseisen upon his hiring constituted gender discrimination against the full-time female clinical assistant professors in the Department of Nursing. On March 17, 2009, Betty Rambur, Dean of the School of Nursing and Health Sciences, requested that the University's Office of Affirmative Action and Equal Opportunity ("AAEO") conduct its own investigation. The processing of the grievance was suspended until the AAEO could conduct its investigation within a 30 day period as set forth in the Contract (Joint Exhibits 1, 2).

48. Kathryn Friedman is Executive Director of the Diversity and Equity Unit of the University's AAEO Office. Chong Kim is an Investigator with AAEO. Friedman assigned Kim to investigate allegations of sex discrimination based on salary discrepancies concerning the clinical assistant professors of nursing. At the time Kim conducted his investigation, he had shadowed Friedman and the AAEO Office assistant director on a relatively small number of investigations. He had no formal training in conducting investigations. He also had not had any training in labor and employment law, the Equal Pay Act or anti-discrimination laws.

49. On April 15, 2009, Kim and Friedman issued a report. Kim estimated that he spent a total of 16-18 hours investigating the allegations of sex discrimination and writing the report. The report provided in pertinent part as follows:

...

V. Discussion and Analysis

The University's *Equal Employment Opportunity/Affirmative Action Policy* V.7.0.1.2 prohibits discrimination based on gender. The policy applies to all members of the University community.

Based on the testimony of all of the Clinical Assistant Professors in the College of Nursing and the documents they provided, this investigator concludes that while all of the Clinical Assistant Professors have different specialties and areas of expertise, they have similar and comparable qualifications. Similarly, while all of them teach different courses as their teaching load, or in one case have responsibilities in the Nursing Skills Lab, each Clinical Assistant Professor brings something uniquely necessary for Department of Nursing students to be able to sit for the boards as well as for the Nursing program to be certified and accredited. They do, however, have differing levels of experience. Ms. Melvin and Ms. Buck-Rolland have much more teaching experience than all of the other Clinical Assistant Professors. Their salaries are \$57,191.38 and 58,359.07 respectively. Ms. Muskus, Ms. Montgomery and Ms. Curley were either hired into or transferred into the Clinical Assistant Professor position between 2006 and 2007. While clinical experience varies, all of them have more teaching experience than Mr. Linseisen, and have similar salaries at \$51,713.33, \$50,911.35 and 51,458.49, respectively. Mr. Linseisen was hired in 2008 and while having less teaching experience than all of his female peers, has a salary of \$58,000.

Dr. Newschwander gave a number of reasons as to why Mr. Linseisen was hired at \$58,000. First, the salaries for practicing nurses went up "quickly and steeply" and every time he conducted a search he felt that he had his "back to the wall" trying to keep up with the rising salaries. Second, there is a problematic Nursing faculty shortage across the country, which may be due in part to the fact that practicing nurses make significantly more money than their academic counterparts. Third, the position Mr. Linseisen was hired into was vacant for a number of years. The position was originally meant to be a tenure track position, but when qualified candidates could not be found it was changed over to a clinical track position. That shift also meant that more money was available in the Clinical Assistant Professor line. Fourth, around the time of Mr. Linseisen's hire the Department of Nursing started an accelerated Master's program, which exponentially increased enrollment in the graduate program. The increase in enrollment meant that existing faculty were increasingly asked to do more and Dr. Newschwander felt a "fair amount of pressure" to make a successful hire to increase the faculty ranks for graduate students. Dr. Newschwander states that he was afraid that he would lose some of the existing faculty had Mr. Linseisen not been hired. He goes on to state that had Mr. Linseisen known how much of a

“bind” the department was in, he could have negotiated his salary higher. Sixth, Mr. Linseisen was an attractive candidate. Mr. Linseisen brought with him primary care expertise that allowed him to teach in the graduate program. Additionally, Mr. Linseisen brought with him acute setting expertise, which allows him to teach in the medical-surgical area for undergraduates.

Dr. Newschwander, Dr. Reed and Dr. Carr contend that faculty salaries in nursing may be experiencing compression as incremental raises are not able to keep up with the fast rising salaries of the market. They have also stated that some faculty may be disadvantaged in this way by being at the University for a long time. This analysis could be true for the longer term Clinical Assistant Professors Christiania Melvin and Carol Buck-Rolland. But it is not true for Maureen Curley, Catherine Muskus or Rebecca Montgomery, all hired between 2006 and 2007, in nearly the same market that Mr. Linseisen was. Additionally, an analysis of the available market data provided by Fred Curran, Director of Institutional Studies, shows that there is nothing in the market data to support the \$58,000 FY2009 salary given to Mr. Linseisen when compared to the other five clinical assistant professors.

While all of the conditions described by Dr. Newschwander for Mr. Linseisen’s hire may have been true, Dr. Newschwander also hired Ms. Curley, Ms. Muskus and Ms. Montgomery in the same three year time frame. The treatment that these women faculty received in terms of salary negotiations stands in contrast to the treatment Mr. Linseisen received. Ms. Montgomery was told by Dr. Newschwander that there was no negotiation on salary and that he had a very strict range for salary. Ms. Curley did attempt to negotiate her salary and he did move her offer up by a few thousand dollars. However, Dr. Newschwander informed her that there were clear benchmarks for salary according to what individuals in similar positions in the department were making. When Ms. Muskus was hired into her current position, she was told that there was no negotiation in salary when moving from lecture to clinical assistant professor. Mr. Linseisen was not told by Dr. Newschwander that negotiation was not available or that salaries were constrained by what others in the department were making. Instead they freely negotiated from the original offer of \$55,000, which was \$6,000 to \$9,000 more than the starting salaries of Ms. Curley, Ms. Muskus and Ms. Montgomery, to agree on \$58,000. Dr. Newschwander states that he felt his “back to the wall” during every hire, yet this did not translate into higher salaries for the women who were hired during the last three years. Ms. Curley and Ms. Muskus were hired at 18% less, and Ms. Montgomery 26% less than Mr. Linseisen. The market changes in the three years with which we are concerned do not support this difference. It appears that the only true difference between the individuals is gender.

VI. Conclusion

The women Clinical Assistant Professors in the Department of Nursing within the College of Nursing and Health Sciences have not been treated equally to their recently-hired male colleague with respect to their salaries.

(Joint Exhibit 2)

50. The analysis by Fred Curran, UVM Director of Institutional Studies, referred to in Kim and Friedman report involved comparative salary information for clinical professors in nursing programs prepared annually by the American Association of Colleges and Nursing (“AACN”). Curran sent a memorandum dated April 13, 2009, to Friedman, Kim and Senior Associate Counsel Lucy Singer as a result of his analysis. The memorandum provided in pertinent part:

...

COMPARATIVE SALARY INFORMATION

The 2008-09 average salary of \$54,606 for UVM clinical assistant professors is \$3,323 lower than the average (\$57,929) from the AACN report for clinical assistant professors at institutions with non-doctoral nursing programs. UVM appears to have closed the gap evident in the 2007-08 data when the salary differential between the UVM average and the AACN average was just over \$6,138. This could be due in part to the larger number of faculty reported in 2008-09.

Three UVM clinical assistant professors are near or above the AACN average and three are \$6,000 to \$7,000 below the AACN average. Unfortunately, the AACN data are not disaggregated by years of experience or faculty highest degree level which could provide a more detailed comparison.

Of the three UVM clinical assistant professors paid close to or above the AACN average, Jerry Linseisen’s years at UVM and years since receiving his master’s degree more closely approximates the experience of the three lower paid UVM clinical assistant professors.

UVM CLINICAL ASSISTANT PROFESSOR SALARIES

I have undertaken a limited review of the curricula vitae of the six UVM clinical assistant professors and their years since their UVM hire date, years since receiving their master’s degree, and 2008-09 salary. There does not appear to be substantial evidence in these admittedly limited supporting materials to support the FY 2009 \$58,000 salary awarded to Jerry Linseisen.

CONCLUSION

To the point, I can find nothing in the data and materials available to me that support the \$58,000 FY 2009 salary given to Jerry Linseisen when compared to the other five clinical assistant professors.

Unfortunately, available materials do not provide definitive information that might indicate the effects of market demand on nursing clinical faculty salaries generally or on specific nursing specialties. Salary compression may be a factor, but I cannot determine if it is the only factor.

...

(Joint Exhibit 2, Appendix 3)

51. Neither Kim nor Friedman spoke with Curran about his April 13, 2009, memorandum, prior to the issuance of their report. Curran issued a revised memorandum on April 28, 2009. The memorandum was revised only in the first paragraph of the “Comparative Salary Information” section. The revised paragraph provided:

...

COMPARATIVE SALARY INFORMATION

The 2008-09 average salary of \$54,606 for UVM clinical assistant professors is \$9,202 lower than the average (\$63,898) from the AACN report for clinical assistant professors at institutions with non-doctoral programs. UVM appears to have closed slightly the gap evident in the 2007-08 data when the salary differential between the UVM average and the AACN average was just over \$10,380. This could be due in part to the larger number of faculty reported in 2008-09. The differences in the salaries of the six UVM clinical assistant professors and the AACN average salary ranges from -\$5,500 to -\$13,000. Unfortunately, the AACN data are not disaggregated by years of experience or faculty highest degree level, which could provide a more detailed comparison. (UVM Exhibit 6)

52. Linseisen resigned from his position as Clinical Assistant Professor effective May 28, 2010 (Union Exhibit 39).

53. The Union presented Mark Killingsworth, a Professor of Economics at Rutgers University, as an expert witness in this case. Killingsworth reviewed the AAEO Report and certain data pertaining to Clinical Assistant Professors in the UVM Department of Nursing over a period of several years – specifically their gender, age,

years since Master's degree, years at UVM and salary – and performed an analysis with respect to that data. He issued a report concluding “that the evidence provides strong support for the claim that male clinical assistant professors are paid considerably more than are comparably-qualified female clinical assistant professors.” In reaching this conclusion, Killingsworth operated under the assumption that Linseisen was no better qualified than any of the five full-time female clinical assistant professors in the Department of Nursing.

54. In his report, Killingsworth did not discuss whether there were other qualified candidates for the faculty position for which he was selected, but he believed there were several other qualified candidates. Killingsworth reached his conclusion based on a sample size of 6 to 7 faculty in each year he reviewed. Killingsworth did not include in his analysis any criteria for qualifications of clinical faculty other than years since Master's degree and years at UVM. He did not take into account that qualifications of clinical faculty may be significantly impacted by the extent of high level practical experience which they have (Union Exhibit 41).

55. The Employer presented James Fox, an economist with a doctoral degree in Sociology, as an expert witness. Fox is managing director of a firm which, among other things, engages in pay equity studies. He conducted an analysis of faculty positions in the UVM College of Nursing and Health Sciences to determine if gender bias exists for salaries paid in the 2008-2009 academic year. Fox concluded that the “statistical analyses did not indicate any systemic gender bias for faculty salaries in the College of Nursing and Health Sciences”. Fox further concluded that “when examining the Nursing

Department in isolation, gender was not found to be a statistically significant variable” (Employer Exhibits 1, 2; Union Exhibit 42).

56. In conducting his study, Fox examined the full-time faculty in the College of Nursing and Health - tenure track faculty and clinical faculty - together. He did not have data on years of clinical experience for the clinical faculty members. He also did not have information on types of nursing specialties or certifications of the clinical faculty members (Employer Exhibits 1, 2; Union Exhibit 42).

OPINION

The Union contends that the Employer violated Article 5.1 of the Contract by paying newly hired Clinical Assistant Professor of Nursing Jerry Linseisen a salary for the 2008-2009 academic year which constituted discrimination based on gender when compared with female clinical nursing faculty members Carol Buck-Rolland, Maureen Curley, Christina Melvin, Catherine Muskus and Rebecca Montgomery.

We first address a few preliminary issues. The deadline for postmarking post-hearing briefs established at the hearing and agreed upon by the parties was three weeks after the transcript of the hearings in this matter was completed. This date was July 8, 2010. Both parties post-marked briefs on July 8, 2010, and they were received by the Labor Relations Board on July 9, 2010. On July 21, 2010, the Employer filed a reply memorandum. The Union objects to the Board considering this document in deciding this case because it was filed after the established deadline for submitting briefs.

We concur with the Union and decline to consider the Employer’s reply memorandum. Section 12.16 of Board *Rules of Practice* provides:

Any party shall be entitled upon request made before the close of the hearing to file a brief or requests for findings of fact and conclusions of law, or both, within such time as may be fixed by the Board. . . Failure to file a brief when due shall mean the Board will consider the party to have waived its right to file a brief and such brief shall not be considered by the Board. . .

Previously, the Board has cited this provision to decline to consider an addendum to a brief filed by a party the day following a mutually agreed upon deadline for submitting briefs on which both parties had filed their briefs in chief.¹ The Board reasoned:

This provision prohibits late filing of an addendum to a brief just as it does not allow late filing of the brief in chief. Otherwise, the purpose of mutual filing of briefs pursuant to a deadline would be frustrated. One party would gain an unfair advantage over the other party in asserting its arguments.²

Similarly here, this provision prohibits filing of a reply memorandum by a party after the mutually agreed upon deadline for filing briefs. Otherwise, the purpose of mutual filing of briefs pursuant to a deadline would be frustrated. One party would gain an unfair opportunity to respond to the other party's brief that was contrary to the established schedule for filing briefs.

Another preliminary issue is whether to grant a motion of the Employer to dismiss Carol Buck-Rolland as a grievant. The Employer contends that Buck-Rolland must be dismissed as a grievant based on the provisions of the Vermont Fair Employment Practices Act ("VFEPA"), which prohibits "paying wages to employees of one sex at a rate less than the rate paid to employees of the other sex for equal work that requires equal skill, effort, and responsibility, and is performed under similar working

¹ Grievance of Davidson, 30 VLRB 337, 351-352 (2009).

² Id. at 352.

conditions.”³. The Employer asserts that VFEPA precludes a remedy being granted to Buck-Rolland because her salary is higher than Jerry Linseisen.

The Union contends that the motion is flawed because the Union is the grievant in this matter, not Buck-Rolland. The Union also asserts, among other things, that the Employer ignores the fact that “equal pay for equal work” analysis under VFEPA is only one way to demonstrate sex discrimination. The Union contends that, even assuming *arguendo* that the Union cannot make out a claim of discrimination based on the VFEPA, the Union may prevail based on disparate treatment and disparate impact theories of discrimination under Title VII of the Civil Rights Act as incorporated into Article 5 of the Contract.

We concur with the Union that the Employer’s motion should be denied on both of these grounds. United Academics is the named grievant in the grievance filed in this matter, and the requested remedy is that “the female professors be made whole in all respects for the discriminatory conduct of the employer, (and) that the employer be ordered to cease and desist from discriminating against female professors in pay and other compensation”.

The State Employees Labor Relations Act defines “grievance” as an “employee’s, group of employees’, or the employee’s collective bargaining representative’s expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective agreement or the discriminatory application of a rule or regulation.”⁴ The Board has noted that this statutory definition of grievance expressly contemplates representative grievances being brought by the employees’ collective bargaining

³ 21 V.S.A. §495(a)(8).

⁴ 3 V.S.A. §902(14).

representative, and has concluded that unions have the ability to bring representative grievances.⁵ The Union has brought such a representative grievance in this matter which properly covers Buck-Rolland as an employee represented by the Union.

Moreover, “equal pay for equal work” claims are not the only avenue for sex discrimination claims involving compensation. In one grievance where a female state employee contended that the State discriminated against her on the basis of her sex by classifying her position at a lower pay level than positions exclusively held by males, the Board stated:

In cases where there is an allegation of sex discrimination regarding compensation, a complainant may establish a prima facie case of discrimination by proving that she is a member of a protected class, and that she is paid less than a non-member for work requiring substantially equal levels of skill, effort and responsibility. . .

However, claims of intentional sex-based wage discrimination can also be brought even though no member of the opposite sex holds an equal but higher paying job. *County of Washington v. Gunther*, 452 U.S. 161 (1981). Otherwise, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. *Id.* At 179.⁶

The Union advances in this grievance both an “equal pay for equal work” claim and an intentional sex-based wage discrimination claim based on a disparate treatment theory. The Union may be able to demonstrate under the disparate treatment theory that Buck-Rolland was discriminated against based on her gender even though her salary was higher than Linseisen. Thus, we deny the Employer’s motion which is premised on an assumption that Buck-Rolland’s salary must be less than Linseisen’s for sex discrimination to be demonstrated.

⁵ Grievance of VSEA (re: Compensatory Time Credit), 11 VLRB 300 (1988). Grievance of VSEA and Hooper, 27 VLRB 167, 184-186 (2004).

⁶ Grievance of Lowell, 15 VLRB 291, 330-331 (1992).

We turn to addressing the merits of the sex discrimination claims made by the Union. The Union first contends that the salary paid to Linseisen constituted discrimination against the female clinical nursing faculty in violation of the federal Equal Pay Act and its Vermont counterpart, VFEPA. We need to determine whether these federal and state statutes are properly considered by the Board in our role as making final determination of employee grievances. The Vermont Supreme Court has held in several cases that statutory provisions are not encompassed within the definition of "grievance" unless they are incorporated into a collective bargaining agreement, rule or regulation.⁷ Neither party challenges the authority of the Board to consider these statutory provisions, and we conclude that they are incorporated into the provisions of Article 5 of the Contract prohibiting discrimination based on sex.

The VFEPA prohibits "paying wages to employees of one sex at a rate less than the rate paid to employees of the other sex for equal work that requires equal skill, effort, and responsibility, and is performed under similar working conditions."⁸ As part of a *prima facie* case of discrimination based on unequal pay, a female employee must demonstrate that she was paid less than similarly situated males.⁹ The pertinent provisions of VFEPA are modeled closely after the federal Equal Pay Act. The federal Equal Pay Act provides in pertinent part:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which (the employer) pay wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which

⁷ Boynton v. Snelling, 147 Vt. 564 (1987). In re McMahon, 136 Vt. 512 (1978). Grievance of VSCSF and Laflin, 16 VLRB 276 (1993).

⁸ 21 V.S.A. §495(a)(8).

⁹ Robertson v. Mylan Laboratories, 176 Vt. 356, 376, n. 8 (2004).

measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex”.¹⁰

In order to prove a violation of the Equal Pay Act, an employee first must establish a *prima facie* case by demonstrating that an employer is paying different wages to employees of the opposite sex for equal work.¹¹ The jobs held by employees of different sexes need not be identical, but they must be substantially equal in skill, effort and responsibility; and performed under similar working conditions.¹² The question whether two jobs are substantially equal is one that must be decided on a case-by-case basis.¹³ Minor differences in responsibility do not make the equal pay standard inapplicable.¹⁴ Unlike the showing required under Title VII of the Civil Rights Act’s disparate treatment theory, proof of discriminatory intent is not required to establish a *prima facie* case under the Equal Pay Act.¹⁵

A *prima facie* case is not made by showing that employees of a different sex possess equivalent skills; the Equal Pay Act explicitly applies to jobs that require equal skills, and not to employees that possess equal skills.¹⁶ In determining whether the jobs are substantially equal, the focus is not on the unique skills and qualifications of the employees holding a particular job but on the requirements and characteristics of the job itself.¹⁷

Once the employee has established a *prima facie* case of discrimination based on unequal pay, the burden shifts to the employer to prove that the differential in wages is

¹⁰ 29 U.S.C. § 206(d)(1).

¹¹ Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974). Hein v. Oregon College of Education, 718 F.2d 910, 913 (9th Cir. 1883).

¹² Corning Glass Works, 417 U.S. at 195.

¹³ Hein, 718 F.2d at 913.

¹⁴ Maricopa County Community College District, 736 F.2d 510, 514 (9th Cir. 1984).

¹⁵ Beck-Wilson, et al v. Principi, 441 F.3d 353 (6th Cir. 2006).

¹⁶ Hein, 718 F.2d at 914.

¹⁷ Miranda v. B & B Cash Grocery Stores, 975 F.2d 1518, 1532 (11th Cir. 1992).

justified under one of the Equal Pay Act's four exceptions.¹⁸ Employers may reward professional experience and education without violating the EPA.¹⁹ Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA.²⁰

In applying these standards to this grievance, a question arises whether Buck-Rolland is precluded from being granted a remedy under Equal Pay Act provisions because her salary is higher than Linseisen. We conclude that she cannot be granted a remedy because both the VFEPA and the federal EPA provide that a female employee must demonstrate that she was paid less than similarly situated males,²¹ and she was paid a slightly higher salary than Linseisen. Her higher salary does not prevent her from making a claim of intentional sex-based discrimination on a disparate treatment theory, but she is prevented from prevailing on an Equal Pay Act claim.

This leaves consideration of whether the Union is able to establish a *prima facie* case of discrimination based on "equal pay for equal work" for female clinical nursing faculty members Maureen Curley, Christina Melvin, Catherine Muskus and Rebecca Montgomery. The Union contends that each of these clinical assistant professors perform jobs that require substantially equal skill, effort and responsibility to the job performed by Linseisen.

There are some similarities with respect to the requirements and characteristics of the jobs of Linseisen and each of the female faculty members. Qualifications for all positions include a Master's degree with relevant clinical specialization. They all perform teaching and service with responsibility for UVM nursing students. They develop and

¹⁸ Hein, 718 F.2d at 915. Corning Glass Works v. Brennan, *supra*.

¹⁹ Stanley v. University of Southern California, 13 F.3d 1313, 1322 (9th Cir. 1994).

²⁰ Id.

²¹ Robertson v. Mylan Laboratories, 176 Vt. at 376, n. 8. Corning Glass Works, 417 U.S. at 195. Hein, 718 F.2d at 913.

present courses with clinical and classroom instruction. They all evaluate student progress. Each of them maintains a clinical practice outside the University to maintain their clinical skills and/or licenses.

These general similarities are not sufficient to demonstrate that the jobs are substantially equal. In order to so determine, we need to examine the specifics of each job on a case-by-case basis compared to Linseisen to determine whether they are substantially equal to Linseisen's position.²²

A significant requirement of Linseisen's position is that he must be an Advanced Practice Nurse as a Family Nurse Practitioner or Acute Care Nurse Practitioner with pertinent clinical experience treating patients across the life span. Based on his education and experience, Linseisen is qualified to provide services for patients as a Family Nurse Practitioner across the entire life span, from birth to death.

A major requirement of his position is to teach courses at the undergraduate and graduate levels in connection with the Family Nurse Practitioner program. He also assumed the duty of clinical placement of many graduate nurse practitioner students in family practice and adult health settings. This was a major responsibility given the recent addition of the Master's entry program in Nursing ("MEPN") and the popularity of the Family Nurse Practitioner track of the graduate program. Another characteristic of Linseisen's position is that he prescribes medication.

In comparing these requirements and characteristics of Linseisen's position to the position held by Melvin, we conclude that they are not substantially equal. Unlike Linseisen, Melvin is not required to be an Advanced Practice Nurse for her position and she is not a Nurse Practitioner. She teaches courses at the undergraduate level, and places

²² Hein, 718 F.2d at 913.

undergraduate students in clinical positions. Unlike Linseisen, she does not teach graduate courses and is not involved in clinical placement of graduate students. She does not possess the qualification required of Linseisen of being academically prepared to teach primary care to students in the family nurse practitioner track. She also differs from Linseisen in that she does not prescribe medication. The substantial differences in the requirements and characteristics of the two positions result in our conclusion that Melvin's job does not require substantially equal skill, effort and responsibility to the job performed by Linseisen.

Montgomery, like Linseisen, is an Advanced Practice Nurse in her specialty area. However, as a Nurse Midwife, she does not possess the skill and training required for the Family Nurse Practitioner position held by Linseisen. Her expertise in maternal newborn nursing and women's health does not provide her with the ability to provide services for patients as a Family Nurse Practitioner across the entire life span. Similarly, Montgomery is able to prescribe medication to women but, unlike Linseisen, she cannot do so for men or otherwise treat men. Also, unlike Linseisen, she is not required to teach graduate level students and does not handle the placement of graduate students. In sum, the significant differences between the two positions leads us to conclude that Montgomery's job does not require substantially equal skill, effort and responsibility to the job performed by Linseisen.

The position held by Muskus varies significantly from that held by Linseisen. She spends nearly half of her duties at UVM as nursing skills lab director, duties not comparable to those performed by Linseisen. Also, unlike Linseisen, Muskus has not taught graduate students or placed them in clinical settings during her tenure at UVM.

Although Muskus is certified as a Family Nurse Practitioner, her skills in this regard are not comparable to Linseisen. She had no clinical experience as a Family Nurse Practitioner until early 2008 at which point she assumed a one day a week clinical practice position as a Family Nurse Practitioner. Her experience and responsibilities as a Family Nurse Practitioner are much more limited than Linseisen's extensive background and responsibilities as a Family Nurse Practitioner. In sum, we conclude that Muskus's job is significantly different and does not require substantially equal skill, effort and responsibility to the job performed by Linseisen.

The position held by Curley is similar to that held by Linseisen in certain respects. They both are Advanced Practice Nurses. They both teach undergraduate and graduate students. They both are responsible for the clinical placement of graduate students. Nonetheless, we conclude that their positions do not require substantially equal skill, effort and responsibility. Curley is not qualified to teach the primary or acute care courses required of Linseisen as a Family Nurse Practitioner. Similarly, her ability to prescribe medication is limited to psychiatric medication, differing from Linseisen who is not so limited.

Also, it is apparent that the effort and responsibility required of her position is less than that of Linseisen. This is reflected in the fact that there are far fewer psychiatric nursing students than family nurse practitioner students in the graduate program, resulting in Curley having less responsibility than Linseisen in the instruction and placement of graduate students. Also, Curley is granted 15 percent paid release time for doctoral research. Linseisen has no comparable paid workload reduction.

In sum, the Union has not established a *prima facie* case of discrimination on the Equal Pay Act claim for Melvin, Montgomery, Muskus and Curley. The Union has not established that these clinical assistant professors perform jobs that require substantially equal skill, effort and responsibility to the job performed by Linseisen. Thus, we dismiss this claim.

We next address the Union's intentional sex-based wage discrimination claim based on a disparate treatment theory. The Union contends in this grievance that the reasons given by the University of Vermont in support of the salary it paid Linseisen, compared to the salaries of the female professors of nursing, constituted a pretext for the true reason of gender discrimination against female professors Buck-Rolland, Curley, Muskus, Melvin and Montgomery.

In its *County of Washington v. Gunther* decision, the U.S. Supreme Court held that Title VII of the Civil Rights Act's prohibition of sex-based wage discrimination is not restricted to claims for equal pay for equal work. Rather, the Court held that claims for sex-based wage discrimination can also be brought even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on the Equal Pay Act's affirmative defenses as to wage differentials attributable to seniority, merit, quantity or quality of production, or any other factor other than sex.²³ In so holding, the Court stated that Title VII prohibits "all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of . . . sex.", and that "(i)n forbidding employers to discriminate against

²³ 452 U.S. at 167-168.

individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”²⁴

In determining whether an employee was discriminated against on account of the prohibited factor of sex, the Court has set forth the basic allocations of burden and order of presentation in disparate treatment cases.²⁵ The Court has made it clear that the burden of proof remains at all times with the plaintiff.²⁶ The Vermont Labor Relations Board has accepted this analysis in sex discrimination cases brought before the Board.²⁷ The central focus of inquiry in a disparate treatment case is always whether the employer is treating "some people less favorably than others because of their . . . sex".²⁸ To establish a disparate treatment claim, "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally."²⁹

The U.S. Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case involving alleged sex discrimination.³⁰ The Union advances the "pretext" theory in this case. In a "pretext" case, the issue is whether the legitimate business reasons offered by the employer for the adverse action are just a pretext for the real reason of discrimination.³¹ The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision.³²

²⁴ Id. at 180.

²⁵ McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

²⁶ Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

²⁷ Grievance of McIsaac, 26 VLRB 24 (2003). Grievance of Butler, 17 VLRB 247 (1994); *Affirmed*, 166 Vt. 423 (1997). Grievance of Lowell, 15 VLRB 291 (1992). Grievance of Smith, 12 VLRB 44 (1983). Grievance of Rogers, 11 VLRB 101 (1988).

²⁸ Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

²⁹ Butler, 166 Vt. at 431; *citing* Burdine, 450 U.S. at 258.

³⁰ Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

³¹ Id.

³² Id.

The analysis used is that which is set forth in U.S. Supreme Court cases.³³ First, the complainant carries the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination.³⁴ The burden of establishing a *prima facie* case of disparate treatment is not onerous.³⁵ The complainant must prove by a preponderance of the evidence that he or she was subject to an adverse employment action under circumstances that give rise to an inference of discrimination.³⁶ The U.S. Supreme Court stated:

As the Court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.³⁷

As discussed above, in cases where there is an allegation of sex discrimination regarding compensation, a complainant may establish a *prima facie* case of intentional sex-based wage discrimination even though no member of the opposite sex holds an equal but higher paying job.³⁸ The complainant must present evidence creating an inference that the wage disparity, if otherwise unexplained, is more likely than not based on intentional sex discrimination.³⁹ Discriminatory intent will not be inferred merely from the existence of wage differentials between jobs that are only similar.⁴⁰ However, the comparability of jobs can be relevant to determining whether discriminatory animus

³³ Burdine, *supra*. Lowell, 15 VLRB at 329.

³⁴ Id.

³⁵ Burdine, 450 U.S. at 253. Lowell, 15 VLRB at 330.

³⁶ Id.

³⁷ Burdine, 450 U.S. at 254.

³⁸ County of Washington v. Gunther, *supra*.

³⁹ Grievance of Lowell, 15 VLRB 291, 330-332 (1992).

⁴⁰ Id. at 331.

can be inferred.⁴¹ The comparability of the involved positions is considered, along with other evidence of discriminatory animus, to determine whether an inference of discriminatory motive can be supported.⁴²

If the employee succeeds in proving the *prima facie* case, then the burden is shifted to the employer to articulate a legitimate non-discriminatory reason for the adverse action.⁴³ The employer need not persuade the court or the board that the proffered reason was the true motivation for the action. It must only raise a genuine issue of fact as to whether the employer engaged in discrimination.⁴⁴ To accomplish this, the employer must clearly set forth, through the introduction of admissible evidence, the reasons for its actions.⁴⁵ The explanation provided must be legally sufficient to justify a judgment for the employer.⁴⁶ This second step serves to respond to the employee's *prima facie* case as well as "to frame the factual issue with specific clarity so that the (employee) will have a full and fair opportunity to demonstrate pretext."⁴⁷

The employer must produce admissible evidence that would allow the court or the board rationally to conclude that the employer's actions had not been motivated by discriminatory animus.⁴⁸ The determination whether the employer has met the burden of production involves no credibility assessment.⁴⁹ If the employer fails to meet its burden

⁴¹ Id.

⁴² Id. at 331-332

⁴³ Burdine, 450 U.S. at 253. Smith, 12 VLRB at 53.

⁴⁴ Burdine, 450 U.S. at 254.

⁴⁵ Id. at 255.

⁴⁶ Id.

⁴⁷ Robertson v. Mylan Laboratories, Inc., 176 Vt. 356, 367 (2004); *citing* Burdine, 450 U.S. at 255-256.

⁴⁸ Burdine, 450 U.S. at 257.

⁴⁹ St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2748 (1993).

of production, then the employee prevails on his or her claim of discrimination as a matter of law.⁵⁰

Finally, if the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination.⁵¹ The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains at all times with the complainant.⁵² A complainant may succeed in this burden of persuasion either directly by establishing that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.⁵³

In determining whether the employer's explanation was pretextual, the trier of fact may consider the evidence, and inferences properly drawn therefrom, previously introduced by the complainant to establish a *prima facie* case.⁵⁴ Disbelief of the reasons put forward by the employer (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination.⁵⁵

The first step in this analysis is to determine whether the Union has presented evidence establishing a *prima facie* case of discrimination based on sex. In this regard, we consider the comparability of the positions held by the female professors and Linseisen. As discussed above in the analysis of the Equal Pay Act claims, we have

⁵⁰ Id. Grievance of Day, 16 VLRB 312, 344 (1993).

⁵¹ Burdine, 450 U.S. at 253. McDonnell Douglas, 411 U.S. at 804. Rogers, 11 VLRB at 126.

⁵² Burdine, 450 U.S. at 253. Rogers, 11 VLRB at 125-26.

⁵³ Burdine, 450 U.S. at 256. Lowell, 15 VLRB at 336.

⁵⁴ Burdine, 450 U.S. at 255, n.10. Lowell, 15 VLRB at 336-37.

⁵⁵ Hicks, supra. Day, 16 VLRB at 345.

determined that the positions held by female professors Melvin, Muskus, Montgomery and Curley were not substantially equal in skill, effort and responsibility to Linseisen's position. However, the positions are at least generally comparable. They all are clinical assistant professors in the Department of Nursing holding positions requiring Masters degrees in Nursing. Although they all have different specialties and areas of expertise, their qualifications are generally comparable.

We did not compare the position held by Buck-Rolland to Linseisen's position in our analysis of the Equal Pay Act claims given our ruling that Buck-Rolland was precluded from being granted a remedy under Equal Pay Act provisions because her salary is higher than Linseisen. In now comparing these positions as part of the intentional sex discrimination claim, we note that the Employer does not dispute that Buck-Rolland was performing work equivalent to that performed by Linseisen, and that her position required substantially equal skill, effort and responsibility. We concur, and conclude that Buck-Rolland's position closely approximates Linseisen's position in skill, effort and responsibility.

Like Linseisen, she is in a position using her skills as an Advanced Practice Nurse and Nurse Practitioner. In her position as a full-time clinical faculty member, she has been an integral part of the UVM graduate nursing program. Advising graduate students and clinical placement of them are significant responsibilities of full-time faculty members in graduate programs. This has been a major job duty for Buck-Rolland as it has been for Linseisen. She has been a major factor in the development and growth of the MEPN program which has significantly expanded the UVM graduate nursing program.

An additional relevant factor other than comparability of positions is the seniority of the female professors. Melvin had been a full-time faculty member for approximately 16 years when Linseisen was hired, yet Linseisen's annual salary exceeded her salary by \$809. Buck-Rolland had been a full-time faculty member for 12 years, and her salary exceeded Linseisen's by only \$359.

The size of the gap between Linseisen's salary and those of recently hired clinical female faculty members also is relevant in determining whether an inference of discrimination existed. Montgomery, Curley and Muskus all had been offered clinical faculty positions in the Department of Nursing by Department Chair Greg Newschwander within a few years of the hiring of Linseisen. Their annual salaries were less than Linseisen's by the sizeable amounts of \$7,089, \$6,542 and \$6,287, respectively.

A final factor relevant in considering whether there is an inference of sex discrimination is an examination of the wage negotiations engaged in by Newschwander with each of the clinical faculty members. The evidence indicates that Newschwander moved further from his original wage offer to Linseisen than he did for any of the female faculty members.

In considering these factors of comparability of positions, seniority, size of the wage gap and wage negotiations, we conclude that the Union has presented evidence sufficient to establish a *prima facie* case. The Union having established a *prima facie* case, the burden shifts to the Employer to articulate legitimate, non-discriminatory reasons for the salary paid Linseisen compared to the female clinical faculty members.

The Employer has met this burden. The Employer contends that the Family Nurse Practitioner position for which Linseisen was selected was critical to UVM's Family

Nurse Practitioner program and that it had been vacant for four years. Expansion of the MEPN program meant that significantly more students were feeding into the graduate program, and the large majority of graduate students were selecting the Family Nurse Practitioner track. There were no certified Family Nurse Practitioners on the full-time faculty, and existing full-time faculty in the graduate nursing program were increasingly required to do more work as the graduate program expanded.

The Employer asserts that it experienced great difficulty in filling the position. Market forces contributed to this difficulty due to salaries for practicing nurses rising sharply, resulting in practicing nurses making significantly more money than their academic counterparts. The position originally was meant to be a tenure track position, but when qualified candidates could not be found it was changed to a clinical track position. Even with this change, at the conclusion of the two most recent searches – one that resulted in a rejected offer to Emily Byrne and the one that resulted in the hire of Linseisen – there was only one remaining qualified candidate.

The Employer contends that Linseisen was an attractive candidate for the position, and that it would have been unable to hire him but for the salary offered him. Based on his qualifications and experience, Linseisen was qualified to provide services for patients as a Family Nurse Practitioner across the entire life span. He was capable of teaching undergraduate and graduate students, and finding clinical placements for graduate students in the Family Nurse Practitioner track. Linseisen was employed on a full-time basis in a clinical practice at a higher salary than would be paid by the Employer, and he agreed to take the position only after the Employer agreed to pay him a

salary that he thought would allow him, when combined with a part-time clinical practice, to not experience a reduction in annual income.

These reasons articulated by the Employer constitute legitimate, non-discriminatory reasons for the salary paid Linseisen. The evidence produced by the Employer on these reasons raises a genuine issue of fact as to whether it discriminated against the female clinical faculty members.

The Employer having carried its burden of production, the Union must prove by a preponderance of the evidence that the legitimate reasons offered by the Employer were not its true reasons, but were a pretext for discrimination. The Union contends that the Employer's proffered justifications cannot withstand scrutiny. The Union first points to the \$6,000 difference between the salary offer made to Byrne and the salary paid Linseisen as evidence of the disparate treatment between Linseisen and females. The Union asserts that the discriminatory treatment engaged in by the Employer is further demonstrated by the significantly lower first year salaries paid to Montgomery, Muskus and Curley in the same market in which Linseisen was hired even though they were performing substantially the same work. The Union contends that discrimination against these female faculty members is demonstrated by the Employer engaging Linseisen more actively in negotiations over salary than the females when they applied for their positions.

The Union bolsters its argument that the Employer's market explanation for the salary paid Linseisen lacks credibility due to the report of UVM's Director of Institutional Studies showing that there is nothing in the market data to support the salary given Linseisen when compared to the female clinical professors. The Union also relies on the report of UVM's AAEO Office, concluding that the female clinical assistant

professors had not been treated equally to Linseisen with respect to their salaries, to support its position that the Employer engaged in gender discrimination.

The Union further questions the “pressure” the Employer was under to hire Linseisen given that: 1) existing faculty were adequately teaching students in the MEPN program prior to Linseisen’s hire, and 2) there were other qualified applicants to fill the position. The Union also relies on the expert testimony and report of Dr. Mark Killingsworth to bolster its position that gender discrimination is the reason that the Employer offered Linseisen higher pay.

We analyze each of these claims to determine whether the Union has met its burden of demonstrating by a preponderance of the evidence that the Employer intentionally discriminated against the female clinical faculty members. We first conclude that the salary comparison between Linseisen and Byrne does not contribute to a determination that the reasons offered by the Employer for the salary paid Linseisen were not its true reasons, but were a pretext for discrimination. The \$6,000 difference in salary is effectively narrowed because the offer to Byrne was made for the academic year preceding the year Linseisen was hired. The salaries paid to the five female clinical assistant professors involved in this grievance increased by an average of \$2,576 between these academic years. This provides a general benchmark to view the differences in salaries between academic years, resulting in narrowing the approximate effective differences in salaries between Linseisen and Byrne to \$3,424.

Also, it is significant that Byrne had tentatively accepted the \$52,000 offer which Newschwander made to her. Linseisen on the other hand declined the \$55,000 offer made to him, and then engaged in further negotiations to increase his salary to \$58,000. When

Byrne ultimately decided not to accept the position, she did not attempt to engage in further salary negotiations but informed the Employer that she was not going to accept the position.

In sum, the effective offer made to Linseisen was very close to the offer made to Byrne when it is considered that it was for a later academic year when average faculty salaries had increased. It is apparent that the approximate effective difference of \$3,424 in salary between what Byrne was offered and what Linseisen accepted is largely attributable to the aggressive negotiations engaged in by Linseisen to obtain a larger salary. The Union has not demonstrated in this regard that the legitimate reasons offered by the Employer to acquiesce to paying Linseisen a higher salary than originally offered were not its true reasons, but were a pretext for discrimination based on gender.

We next consider the Union's assertion that the discriminatory treatment engaged in by the Employer is further demonstrated by the significantly lower first year salaries paid to Montgomery, Muskus and Curley in the same market in which Linseisen was hired even though they were performing substantially the same work. The Union relies on how salary negotiations were handled to support this claim. We disagree that these female faculty members were performing substantially the same work as Linseisen. As discussed above in the discussion on the Equal Pay Act claim, the Union has not established that these clinical assistant professors perform jobs that require substantially equal skill, effort and responsibility to the job performed by Linseisen.

We also do not agree that Montgomery, Muskus and Curley were hired in the same market in which Linseisen was hired, or that the manner in which salary negotiations proceeded reflected gender discrimination. They all were hired during earlier

academic years. Moreover, the circumstances of their hiring differed substantially from Linseisen's hiring.

When Montgomery was hired two years earlier than Linseisen, the position she filled had not been open for long and there was not pressure to fill it. The position required someone with maternity experience and there were available faculty with this background. Montgomery accepted a "firm" offer to accept this position at a salary close to the salary of the faculty offer leaving the position.

These circumstances were much different than Linseisen's hiring. The position he filled had been open for several years. There was pressure to fill it as the recently instituted MEPN program significantly expanded the graduate program, placing significant pressure on the Employer to hire a Family Nurse Practitioner as a full-time faculty member to help deal with the increased workload. Linseisen was the only qualified candidate to fill the position. The position was a new one, meaning there was no salary comparison to be made with a departing faculty member. It is apparent that the more active negotiations engaged in with Linseisen than Montgomery resulted from these circumstances, rather than gender discrimination.

The circumstances of Muskus and Linseisen being selected for clinical assistant professor positions differ even more than is the situation with respect to Montgomery. Muskus's position was changed from Lecturer to Clinical Assistant Professor for the 2007-2008 academic year to accommodate her desire to be placed in a position which allowed her one day a week to engage in clinical practice to be certified as a Family Nurse Practitioner. Although there was no change in Muskus's salary as a result of this change and there was no negotiation on salary between Muskus and Newschwander, she

obtained a one day a week clinical practice position as a result of the change which allowed her to significantly increase her wages beyond her UVM salary. These circumstances are not remotely comparable to Linseisen's hiring, and provide no basis to support a claim of gender discrimination.

The circumstances of Curley's hiring also do not provide support for a holding of gender discrimination. Curley engaged in active negotiations with Newschwander over salary, and was successful in having her salary moved up a few thousand dollars from Newschwander's initial offer. The salary of another faculty member was used as a benchmark for her salary. Further, she was able to obtain 15% paid release time for doctoral research when no other clinical assistant professor had been granted release time for doctoral work. The significant concessions obtained by Curley in the give and take of negotiations, taken together with her position not being substantially equal to Linseisen's position, indicates that she was not treated in a discriminatory manner in this regard to Linseisen.

The Union's reliance on the report of Fred Curran, the UVM Director of Institutional Studies, to bolster its argument that the Employer's market explanation for the salary paid Linseisen lacks credibility is misplaced. In focusing only on the statement by Curran in his report that "I can find nothing in the data and materials available to me that support the \$58,000 FY 2009 salary given to Jerry Linseisen when compared to the other five clinical assistant professors", the Union does not present a fair and balanced view of the report. Curran also states in the report that he has "admittedly limited supporting materials" to compare the salary of Linseisen with the five female clinical assistant professors. He further states:

Unfortunately, available materials do not provide definitive information that might indicate the effects of market demand on nursing clinical faculty salaries generally or on specific nursing specialties. Salary compression may be a factor, but I cannot determine if it is the only factor.

Thus, Curran indicated in his report that he did not have sufficient materials to draw a definitive conclusion on whether the salary paid Linseisen compared to the female clinical assistant professors can be supported. Although he found nothing in the materials he had to support the salary, he indicated that more information was needed to indicate the effects of market demand on nursing clinical faculty salaries generally or on specific nursing specialties. Definitive conclusions awaited the development of a full evidentiary record provided at the hearing before the Board.

Similarly, the Union's reliance on the report of UVM's AAEO Office, concluding that the female clinical assistant professors had not been treated equally to Linseisen with respect to their salaries, suffers from the report's lack of development of a full evidentiary record. The AAEO Office was required by the Contract to conduct an investigation and issue a report on the allegations of gender discrimination within 30 days. The AAEO investigator only spent 16-18 hours investigating the allegations and writing the report. This was not sufficient time to adequately draw conclusions in this complex case.

The Union seeks to cast doubt on the justification of the reasons given by the Employer for the salary paid Linseisen by questioning the "pressure" the Employer was under to hire Linseisen given that: 1) existing faculty were adequately teaching students in the MEPN program prior to Linseisen's hire, and 2) there were other qualified applicants to fill the position. These assertions are not supported by the evidence.

The assertion that existing faculty were adequately teaching students in the MEPN program prior to Linseisen's hire implies that there was no need for the Employer to hire a Family Nurse Practitioner as a full-time faculty member. The evidence does not support such a conclusion. The Department of Nursing did not have a Family Nurse Practitioner on its full-time faculty for at least the four years preceding the hiring of Linseisen despite the popularity of the Family Nurse Practitioner track of the graduate program and the addition of the MEPN program. There were several Family Nurse Practitioners on the part-time faculty but Newschwander reasonably concluded that a full-time faculty member who was a Family Nurse Practitioner was needed in the graduate nursing program.

This was because the work that full-time and part-time faculty do are significantly different, especially with regard to the design of programs, development of curriculum, the assessment and evaluation of programs and the committee work that is done on programs. This work is done by full-time faculty and is not engaged in by part-time faculty. Part-time faculty do not serve on committees, they do not serve as advisors to students, and they do not engage in clinical placements of students.

. Advising students and placement of students are significant parts of the responsibilities of full-time faculty members in graduate programs. In the absence of a full-time faculty member who was a Family Nurse Practitioner, Buck-Rolland and Nancy Morris, a tenured full-time faculty member in the Department of Nursing, assumed the bulk of the advising and clinical placement of students in the UVM graduate nursing program. Buck-Rolland Morris are not certified Family Nurse Practitioners. The need to change this arrangement, and fill the full-time Family Nurse Practitioner position, had

become more pressing as the institution of the MEPN program meant that the enrollment in the graduate level family nurse practitioner program was significantly increasing. In sum, there was an urgent need for the Employer to hire a Family Nurse Practitioner as a full-time faculty member.

Also, the Union's contention that there were other qualified applicants to fill the position into which Linseisen was hired is belied by the evidence. At the time Linseisen applied for the position, the search committee for the position recommended Linseisen as the only qualified candidate for the position.

Finally, we address the Union's reliance on the expert testimony and report of Dr. Mark Killingsworth to bolster its position that gender discrimination is the reason that the Employer offered Linseisen higher pay. We conclude that there are deficiencies in Killingsworth's report which preclude us from relying on it.

Killingsworth concluded "that the evidence provides strong support for the claim that male clinical assistant professors are paid considerably more than are comparably-qualified female clinical assistant professors." Killingsworth reached this conclusion even though he only had a sample size of 6 to 7 faculty in each year he reviewed. This is too small a sample size to reach such a sweeping conclusion. His conclusion is also called into question by his assumption that Linseisen was no better qualified than any of the five full-time female clinical assistant professors in the Department of Nursing. As discussed above, there is no basis for this assumption.

The usefulness of his report is further diminished by the fact that he did not consider whether there were other qualified candidates for the faculty position for which Linseisen was selected. Again, as discussed above, there were no other qualified

candidates. The availability of other candidates is a relevant consideration when considering the salary paid Linseisen. Also, Killingsworth did not include in his analysis any criteria for qualifications of clinical faculty other than years since Master's degree and years at UVM. This constituted a significant deficiency because qualifications of clinical faculty may be significantly impacted by the extent of their high level practical experience.

We note that the expert witness provided by the Employer also was not persuasive. The full-time faculty group he examined was too broad. Also, he did not have sufficient data and other information to reach a useful conclusion.

Before concluding our discussion of the Union's claim of intentional sex discrimination, we would like to discuss the nearly identical salary that Linseisen was provided compared to Buck-Rolland. This is of concern given Buck-Rolland's length of tenure at UVM, her undisputed impressive contributions to the UVM graduate nursing program, and the substantially equal nature of her and Linseisen's positions. Nonetheless, the Union has not established that the Employer discriminated against Buck-Rolland on the basis of her gender in providing Linseisen with a nearly identical salary to her.

Instead, it is apparent that Buck-Rolland's salary is reflective of the phenomenon of compression, which is characterized by a narrowing of differences to a significant degree between the salaries of continuing faculty members and the salaries of newly hired faculty members. Buck-Rolland happened to be hired in the 1990's, prior to the sharp increases in the salaries for practicing nurses which have occurred since the early 2000's. Academic salaries for nurses such as Buck-Rolland have not risen nearly as high as clinical practice salaries. This has created a market situation where a newly hired

faculty member like Linseisen can secure a nearly identical salary to Buck-Rolland. The remedy for this situation lies in the market/compression salary increases provided for in the existing Contract and any subsequent collective bargaining agreement provisions negotiated by the Union and Employer.

In sum, the Union has not proven by a preponderance of the evidence that the legitimate reasons offered by the Employer for the salary paid Linseisen were not its true reasons, but were a pretext for discrimination. The Employer viewed the hiring of a Family Nurse Practitioner as a full-time clinical faculty member as critical to UVM's Family Nurse Practitioner program. There had been no certified Family Nurse Practitioner on the full-time faculty for several years, and expansion of the MEPN program particularly made the hiring of such a person urgent for the Employer.

Despite this urgent need, the Employer experienced difficulty in filling the position and went through several years of unsuccessful searches. At the conclusion of the most recent search, Linseisen was the only remaining qualified candidate. The Employer saw him as an attractive candidate for the position, and concluded that it would have been unable to hire him but for the salary offered him. The Union has not established that, in agreeing to this salary, the Employer engaged in intentional sex discrimination.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of the United Academics, AAUP/AFT, filed in this matter is dismissed.

Dated this 5th day of October, 2010, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward R. Zuccaro

Edward R. Zuccaro, Chairperson

/s/ Leonard J. Berliner

Leonard J. Berliner

/s/ Gary F. Karnedy

Gary F. Karnedy